TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~294.~~ 96

THE GREAT WESTERN INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM THWING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED NOVEMBER 17, 1870.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES, *ss:*

[SEAL.] The President of the United States to the judges of the circuit court holden in and for the district of Massachusetts, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between the Great Western Insurance Company of New York, plaintiff, and William Thwing, of Boston, in the district of Massachusetts, merchant, defendant, in a plea of the case a manifest error has intervened, to the great damage of the said insurance company, plaintiff, as in its complaint has been stated. And as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States, on the first Monday of December next, at Washington, being the present seat of the National Government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Salmon P. Chase, esquire, Chief Justice of the said Supreme Court, at Washington aforesaid, this first day of November, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

JOHN G. STETSON, *Clerk.*

Allowed by—

JNO. LOWELL, *Judge.*

2 Circuit court of the United States.

MASSACHUSETTS DISTRICT, *ss:*

And now here the judges of the circuit court of the United States in and for the said district, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States, within and for the district of Massachusetts, have hereunto set my hand and seal of said court this fourteenth day of November, A. D. 1870.

[SEAL.] JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States, for the first circuit, begun and holden at Boston within and for the district of Massachusetts, on Saturday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy, before the Honorable George F. Shepley, circuit judge.

THE GREAT WESTERN INSURANCE COMPANY, a corporation duly organized under the laws of the State of New York, and having their usual place of business in the city, county, and State of New York, plaintiffs,
v.
WILLIAM THWING, OF BOSTON, IN OUR DISTRICT of Massachusetts, merchant, defendant.
} In a plea of the case.

4 For that the said defendant, on the day of the purchase of this writ, being indebted to the plaintiffs in five thousand dollars, for goods sold and delivered by the plaintiffs to the defendant, and in the same amount for work done, and materials for the same provided by the plaintiffs for the defendant, at his request; and in the same amount for money lent by the plaintiffs to the defendant; and in the same amount for money received by the defendant to the use of the plaintiffs; and in the same amount for money paid by the plaintiffs for the use of the defendant, at his request; and in the same amount for money due from the defendant to the plaintiffs for interest of money before then due and owing from the defendant to the plaintiffs, and by the plaintiffs forborne to the defendant, at the defendant's request, for a long time before then elapsed; and in the further sum of five thousand one hundred & sixteen dollars and four cents, according to the account annexed; in consideration thereof promised to pay the same amount to the plaintiffs on demand, yet he has not paid the same. To the damage of the said plaintiffs, as they say, the sum of ten thousand dollars.

The account annexed is as follows:

Account annexed.

5 *W'm Thwing to the Great Western Insurance Co., Dr.*

To cash paid you May 6th, 1864	$4,221 16
" interest on same to date of writ	$ 894 88
Whole am't	$5,116 04

The writ in this cause is dated the twentieth day of November, A. D. 1867, and was entered at the May term of this court, A. D. 1868, when and where the parties appeared by their respective attorneys, and thence the cause was continued to the October term of this court, A. D. 1868, when the following pleas were filed, namely:

And the said def't, by Thaxter & Bartlett, his att'ys, comes & defends the wrong & injury when, &c., and says he did not undertake or promise, in manner or form, as the said pl'ff has within complained; and of this the said def't puts himself upon the country.

THAXTER & BARTLETT,
Att'ys for Def't.

And the pl'ff doth the like.

M. E. INGALLS,
Att'ys for Pl'ff.

Issue being thus joined, the cause, after a full hearing was committed to a jury sworn according to law to try the issue, who, after hearing all

matters and things concerning the same, return their verdict therein upon oath, and say: The jury find that the defendant did not
6 promise in manner and form, as the plaintiffs have thereof declared against him in their writ and declaration.

This cause was thence continued from term to term to this present term, when, to wit, October 26th, A. D. 1870, the Honorable John Lowell, district judge, sitting, it is considered by the court that the said William Thwing, defendant, do recover against said Great Western Insurance Company, plaintiff, his costs of suit taxed at .

Upon the trial of the said cause after the evidence was closed on both sides, and before the issue was submitted to the jury, the said Great Western Insurance Company filed its bill of exceptions, which was sealed and allowed by the court, and is in words and figures following, namely:

Circuit court of the United States, district of Massachusetts, October term, 1868.

GREAT WESTERN INSURANCE COMPANY
v.
WILLIAM THWING.

Plaintiff's bill of exceptions.

Be it remembered that this cause came on for trial at the October term, 1868. It was an action of assumpsit for money had and received. The plaintiff made to the defendant a policy of insurance on his ship "Alhambra," on a voyage from Liverpool to San Francisco, a
7 copy of which policy is hereto annexed, marked "A," and is made part of this bill of exceptions. The ship having sustained a partial loss on said voyage, the plaintiff made to the defendant payment on account of said loss which its seeks to recover back in this action upon the ground that it was made under a mistake of fact. This policy of insurance contained among other things, the following clause: "Warranted not to load more than her registered tonnage, with lead, marble, coal, slate, copper ore, salt, stone, bricks, grain, or iron, either or all, on any one passage."

It was agreed that the actual registered tonnage of the ship was 1,285 tons, that the vessel took on board at Liverpool, among other things, 1,064 tons of iron, six tons of brick, and 238 tons of cannel coal. Plaintiff offered evidence tending to show that when it made the payment in question the amount of the ship's cargo and what she was loaded with were unknown to the plaintiff.

The defendant offered evidence tending to show that the master of said ship made a charter-party with James Starkie, of Liverpool, by the terms of which the charterer was to have the full reach of the vessel's hold, and was to pay fifty-one shillings for every ton of freight put on board; that the master agreed with the charterer in addition to
8 the agreement in the charter-party, that he should furnish 250 tons of cannel coal for dunnage of said ship for said voyage, and that under this agreement, he received said 238 tons of cannel coal as dunnage for said ship on said voyage, and that it was used and placed along the bottom of said ship, fore and aft, as dunnage. That he received it, signed a bill of lading for it, that it was on the freight list, collected his freight of fifty-one shillings per ton for it, and delivered it in San Francisco the same as he did the rest of his cargo. That this

coal was better for dunnage than plank, as it weighed less. The defendant also offered evidence of experts, tending to show that a cargo was not properly stowed unless properly dunnaged, and that in cargoes from Liverpool cannel coal is frequently used for dunnage; that cannel coal, when used for dunnage for certain cargoes, is liable to be crushed and otherwise injured; and that when cannel coal is received for cargo, it is usually stowed in a different manner from what it is when used as dunnage, although in some cargoes it would be stowed in the same manner. It also appeared that cannel coal is sometimes taken for dunnage on ship's account and then is sold at the port of discharge on ship's account.

Upon this testimony, plaintiff's counsel asked the court to instruct the jury that if freight was received and paid for this coal, it
9 came within the warranty, although used as dunnage.

The court declined so to rule except as contained in the following instruction, and did instruct as follows: "That, if they believed from the evidence that said cannel coal was received and used as dunnage and not as cargo, it would not amount to a loading under the clause of the policy referred to, and the plaintiff could not recover."

The jury thereupon rendered their verdict.

The jury find that the defendant did not promise in manner and form, as the plaintiffs have thereof declared against him in their writ and declaration. Which verdict was duly recorded.

The plaintiff then and there excepted to the ruling and instruction given as aforesaid by the judge of the court presiding, and requested that its exceptions might be signed and sealed, and inasmuch as the matters herein set forth do not appear in the record, the same have been reduced to writing, and being found to be correct, this bill of exceptions is allowed by the court and directed to be filed as of the nineteenth day of February, 1869, before the jury left the bar.

JOHN LOWELL, *Judge.* [SEAL.]

10 (Copy.)

A.

VESSEL ON VOYAGE

By the Great Western Insurance Company. [No. 32324.

William Thwing, on account of whom it may concern:

, of Boston,

Internal revenue stamp, 25c., cancelled.

In case of loss to be paid to him.

Do make insurance, and cause to be insured, lost or not lost, at and from Liverpool to San Francisco, (warranted not to carry coal oils or petroleum except in tin cans soldered and cased, of the good Br. ship "Alhambra," upon the body, tackle, apparel, and other furniture, whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master hereof, is or shall be named or called.

Sum insured, $20,000.

Beginning the adventures upon the said vessel, tackle, apparel, and other furniture, at and from as aforesaid, and so shall continue and endure until the said vessel shall be safely arrived at as aforesaid, and until she shall be moored twenty-four hours in good safety. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to

this insurance, the said vessel, tackle, apparel, and other furniture, hereby insured, are valued at seventy-five thousand dollars, without any further account to be given by the assured to the assurers, or any of them, for the same.

Warranted by the assured, free from claim for loss or damage arising from seizure, detention, or the consequences of any other hostile act of the government or people of any seceding or revolting State of this Union.
(Signed) J. T. C.

Touching the adventures and perils which the said Great Western Insurance Company is contented to bear, and takes upon itself in this voyage, they are of the seas, winds, waves, rocks, sands, shoals, and coasts, collisions and sinking at sea, fires, jettisons, loss by pirates, rovers, or assailing thieves, barratry of the master and mariners, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment, or damage of the said vessel, or any part thereof occasioned by sea perils. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, factors, servants, and assigns, to sue, labor, and travel for, in and about the defense, safeguard, and recovery of the said vessel, or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute according to the rate and quantity of the sum herein insured, nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; having been paid the consideration for this insurance, by the assured, or assigns, at and after the rate of three and one-half per cent., less fifteen per cent. in lieu of scrip.

And in case of loss, such loss to be paid in thirty days after proof of loss and proof of interest in the said (the amount of any note or notes given this company for premiums, if unpaid, and all other indebtedness being first deducted,) but no partial loss or particular average shall in any case be paid, unless amounting to five per cent. Nor shall the company be liable to pay, by reason of general or particular average and total loss, more in the aggregate than the sum hereby insured; provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then the said Great Western Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Great Western Insurance Company shall return the premium upon so much of the sum by them assured as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises, subsequent in date to this policy, the said Great Western Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent assurance had been made. And it is also agreed, that this policy covers only the original interest subsisting when negotiated, and that any change of interest, in whole or in part, shall cancel the policy in the same ratio. And it is further agreed that this policy shall be void in case of its being assigned, transferred, or pledged, without the previous consent, in writing, of this company. It is also agreed that the property be warranted by the assured free from any charge, damage, or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war. Also

warranted by the assured, free from general average in consequence of loss on ice cargo. And it is further agreed that in case a total loss shall be claimed for or on account of any damage or charge to the said vessel, the only basis of ascertaining her value shall be her valuation in this policy; and if not valued herein, then her actual value at the time of the inception of this risk, at the port to which she then belonged. And it is further agreed that if the above vessel, upon a regular survey, should thereby be declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers shall not be bound to pay their subscription on this policy. And lastly it is agreed, that in case of any claim for loss or damage, a deduction of one-third from the cost of repairing, or replacing the same, shall be made, after deducting the value of the old materials, except in the case of anchors and of sheathing of copper and other metal; a deduction of one-fortieth from the expense of repairing or replacing the metal sheathing or any part thereof, (after first deducting the value of the old metal and nails,) shall be made for every month since the vessel was last sheathed, until the expiration of forty months; after which time the cost of remetaling, or repairing the same shall be wholly borne by the assured. If a technical total loss be claimed, similar deductions shall be made from the estimated repairs, and unless the net cost thereof would exceed a moiety of the value of the vessel after making such deductions, the loss shall be deemed partial only.

Premium,	$700
Policy,	1 55
	$701 25

If the voyage aforesaid shall have begun, and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

Warranted by the assured, not to abandon in case of blockade, and free from any expense or loss in consequence of capture, seizure, detention, restraint, or blockade, or any attempt thereat, or any of the consequences of the hostilities of nations, notwithstanding anything to the contrary in this policy; but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage. Also warranted, not to load more than her registered tonnage with lead, marble, coal, slate, copper ore, salt, stone, bricks, grain, or iron, either or all, on any one passage, and not to carry guano or lime. Also warranted, not to carry grain in bulk except from the ports of New York, Philadelphia, or Baltimore, and in all cases not to exceed one-half the registered tonnage, and the loading to be under the inspection of a surveyor appointed by the board of underwriters, or by this company, for that purpose. The vessel is not to proceed to sea with grain without a certificate from such inspector that the *the* vessel is properly laden and fitted for her intended voyage.

In all cases of return of premium, in whole or in part, not less than one half per cent. upon the sum insured, is to be retained by the assurers; and in case of loss payable, no return of premium to be made under this policy, or its renewal or renewals whether the renewed period has commenced or not.

In witness whereof the president or vice-president of the said Great Western Insurance Company hath hereunto subscribed his name, and the sum insured, and caused the same to be attested by its secretary, in New York, the sixth day of October, one thousand eight hundred and sixty-three.

$20,000, (twenty thousand dollars.)

(Signed) JAMES F. COX, *President.*

(Signed) DOUGLAS ROBINSON, *Secretary.*

(Indorsed:) Copy. No. 32324. Oct'r 6, '63. Great Western
11 Insurance Co. W'm Thwing. Br. ship "Alhambra." Vessel on voyage. L'pool to San Francisco. $20,000 @ 3½ per cent., $700. Policy, 1 25. $701 25. Record, 14; folio, 281. C. O. Jones, stationer, 76 Cedar street, N. Y.

Pay four thousand two hundred & twenty-one $\frac{16}{100}$ dollars in currency, P. L. for ship "Alhambra," from L'pool for San Francisco, insured under within policy.
$4,221 $\frac{16}{100}$.
N. Y., May 6, '64.
(Signed) JOHN A. PARKER, *V. P.*

(Written in red ink across the face:)
E. L. B., fo. 8.
(Signed) W. H. M.
Great Western Ins. Co.
May 6, '64.
(Signed) W. T. L., *Sec'y.*

I hereby certify this to be a true & exact copy of the original policy.
N. Y., July 31, '65.
J. R. SMITH.

12 A true record:
Attest: JOHN G. STETSON, *Clerk.*

13 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, do hereby certify that the foregoing is a true copy of the record and of all proceedings in the cause of The Great Western Insurance Company, plaintiff, v. William Thwing, defendant, in said court determined.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Boston, in said district, this fourteenth day of November, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

[SEAL.] JOHN G. STETSON, *Clerk.*

14 *Bond on writ of error.*

Know all men by these presents that we, The Great Western Insurance Company of New York, having its usual place of business in the city, county, & State of New York, and Nathaniel Foster, junior, of Belmont, in the State of Massachusetts, are held and firmly bound unto William Thwing, of Boston, merchant, in the full and just sum of five hundred dollars, to be paid to the said William Thwing, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, successors, assigns, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated the thirty-first day of October, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately at a circuit court of the United States, begun and holden at Boston, within and for the district of Massachusetts, on the fifteenth day of October, A. D. 1870, in a suit depending in said court

between the said Great Western Insurance Company of New York, plaintiff, and the said William Thwing, of Boston, defendant, judgment was rendered against the said Great Western Insurance Company, and the said Great Western Insurance Company having procured a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Great Western Insurance Company citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next:

Now the condition of the above obligation is such, that, if the said Great Western Insurance Company shall prosecute its said writ of error to effect, and answer all damages and costs, if it fail to make plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

GREAT WESTERN INS. COMP'Y,
By JOHN A. PARKER, *Pres't.* [L. S.]
NATH'L FOSTER, JR. [L. S.]

Signed, sealed, and delivered in presence of—
J. R. SMITH.
M. E. INGALLS.

Approved—

JOHN LOWELL, *Judge.*

This bond may be taken.

THAXTER & BARTLETT,
Att'ys for Thwing.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

15 STATE OF NEW YORK,
City & County of New York, ss:

On the twenty-ninth day of October, in the year one thousand eight hundred & seventy, before me, came John A. Parker, with whom I am personally acquainted, and known to me to be the president of the Great Western Insurance Company, who acknowledged the execution of the within bond, and that the seal which is affixed is the corporate seal of the said corporation, and was affixed by their authority.

[NOTARIAL SEAL.] J. R. SMITH,
Notary Public.

16 The United States of America to William Thwing, of Boston, in the district of Massachusetts, merchant, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the first circuit and district of Massachusetts, wherein The Great Western Insurance Com-

pany of New York is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Lowell, judge of the United States Massachusetts district, this first day of November, in the year of our Lord one thousand eight hundred and seventy.

JOHN LOWELL, *Judge.*

Due, sufficient, and legal service of the above citation is hereby acknowledged.

THAXTER & BARTLETT,
Attorneys for Def't in Error.

(Indorsement on cover:) No. 294. The Great Western Insurance Company, plaintiffs in error, vs. William Thwing. Massachusetts C. C. U. S. Filed 17th November, 1870.

Supreme Court of the United States.

No. 294.

THE GREAT WESTERN INSURANCE CO.,

IN ERROR,

vs.

WILLIAM THWING.

BRIEF OF PLAINTIFFS IN ERROR.

M. E. INGALLS, CHAS. LEVI WOODBURY,
For Plaintiffs.

BOSTON:
ALFRED MUDGE & SON, PRINTERS, 34 SCHOOL STREET.
1871.

Supreme Court of the United States.

No. 294.

THE GREAT WESTERN INSURANCE CO., IN ERROR,

v.

WILLIAM THWING.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

THIS action of assumpsit was brought by the Great Western Insurance Co., a corporation of the State of New York, against Wm. Thwing of Massachusetts, to recover back certain moneys paid under a mistake of fact by the plaintiff to the defendant. The circumstances were these: the plaintiff made to the defendant a policy of insurance on his ship, the "Alhambra," on a voyage from Liverpool to San Francisco. This policy contained the following clause: "Warranted not to load more than her registered tonnage, with lead, marble, coal, slate, copper ore, salt, stone, bricks, grain or iron, either or all, on any one passage."

The ship having met with misfortune and received injury when a few days out, put back to Liverpool for repairs, and the owner claimed the amount named in the declaration under the policy which was paid by the company. The ship resumed her voyage and after her arrival at San Francisco the insurers learned for the first time that she had been laden with more

than her registered tonnage of articles excepted in the warranty, and brought this action to recover back the money paid defendant under mistake of fact. The "Alhambra" was registered as of 1,285 tons burthen. She had in her lading 1,064 tons of iron, six tons bricks, and 238 tons of cannel coal, being an excess of excepted articles.

The defendant alleged that the coal ought not to be considered within the exception, for the reason that it was taken by the master as "dunnage" for the rest of the cargo. The proof showed that he took it on freight, gave a bill of lading to the owner of the coal, and collected the stipulated freight of fifty-one shillings a ton at San Francisco for carrying it. The proof also showed that plank, or billets of wood, were used in ships as dunnage for cargo, and that frequently, at Liverpool, cannel coal was so used.

The errors relied on are, —

First. The refusal of the presiding judge to give the instruction to the jury, asked by the plaintiff, viz.: "That if freight was received and paid for this coal, it came within the warranty, although used as dunnage."

Second. The instruction given by the presiding judge, "That if the jury believed from the evidence that said cannel coal was received and used as dunnage, and not as cargo, it would not amount to a loading, under the clause of the policy referred to, and the plaintiff could not recover."

Errors in Charge.

1. That it incorrectly explained the warranty to the jury; that it gave to the agreements of freight and carriage, which the ship-master and affreighter might make, the effect of determining the scope of the warranty given by the ship-owner to the insurer, in effect holding that if a bill of lading of freight-

paying cargo reads "received on freight," it is within the warranty as to dead weight; but if it reads, "received on freight as dunnage," the warranty does not restrain the amount of dead weight laden on board, or protect the insurer from the risk of a gross and dangerous overlading with dead weight, under the temptations of avarice in freight earning, and a full insurance on the ship. No such option was given the Master to avoid the warranty. 2 Parsons, Mar. Law, 104, and cases cited.

Although Master should provide ballast when necessary for the safety of the ship, or dunnage for proper stowage of cargo, when the charterer does not, yet they are not ships' furniture.

In Kynter's case, Leonard 46–7, the reason given is, "For sometimes the ship may sail without ballast, for it may be *laden* with such merchandizes as are convenient ballast in themselves, as *Coals*, Wheat, &c."

So also — *Lane* vs. *Neil*, 2 *Starkie*, 105.
Town vs. *Henderson*, 4 *W. H. & G.* 892.
Abbot on *Shipping*, p. 5.

Lading so used would not contribute under act of Congress 1851, § 3[illegible]4, as a part of ship. 9 Stat. at large 635

The evidence showing plank and wood to be a usual article for ship's dunnage, and cannel coal to be frequently used at Liverpool (near which it is mined), as dunnage, the charge would lead the jury to infer that the master had the discretion to select the dangerous and prohibited article in preference to the safe and free one wood, and produce the very risk the assured had warranted against before the plaintiffs would insure him.

2. That it did not present the true issue to the jury.

The coal was *received* as cargo on bill of lading and paid the same rate of freight as the rest of cargo; it *was used* as dunnage by permission of shipper, but not of plaintiff, and the law on this state of facts was not stated to the jury.

3. That, considered as a definition of the words "not to

load" in the warranty, it is erroneous, uncertain, and tended to mislead the jury. A bill of lading was given for the freight a common carrier liability assumed

The *use* of a part of cargo as dunnage, does not ascertain the meaning of the verb "to load." The coal retained all the attributes of cargo, paying freight, the carrier's lien on it for freight, liability to contribute as cargo in average; and the effect of the permission of its owner to use it as dunnage being only to relieve the *carrier* from claim of damage done to it, while so used, by bad stowage. It was "load," it was "cargo," intended for traffic, it was "carried," and the shipowner was a "common carrier" of it for hire, and not its owner. The use of "cannel coal" was not indispensable for dunnage, "wood" could have been used A *profit* came from its carriage but the warranty was to restrain the temptation to overload for profit.

4. That not instructing the jury in his charge how the word "cargo" was to be defined, he left them to infer that if a shipper gave the master permission to use his freight for dunnage, it ceased to be within the warranty, and thereby he misled the jury.

Dunnage is defined in McCullock's Com. Dicty title, *dunnage*.

Abbott on Shipping, part 4, ch. 5, *p. 346.

It is the *use* to which the article is put that makes it dunnage; and one part of cargo placed so as to secure the safe storage of the rest is used as and for dunnage, but it does not thereby cease to be lading of the ship. 4 W. G. & H. 892.

The master is liable for damage caused by improper stowage of freight.

Hastings *v.* Pepper, 11 Pick. 41.

If the master contracts with the owner of cargo for liberty to use it as dunnage, he is discharged from any claim on account of damage accruing thereby, and earns the freight, although he delivers it damaged at its destination.

Cargo is defined as the charge or lading of the vessel. In a

general ship it must include all that pays freight. Although passengers are not cargo, their goods are, and formerly slaves were so treated in general average. In a special ship, it includes all merchandise put on board for the purpose of traffic.

Brown *v.* Stapylton *et als.* 4 Bing. 119.

This coal lost none of the other characteristics of cargo, in its relation to the ship, because, by shipper's agreement, damage from use as dunnage was exempted.

The rule in 4 Bing. 119, does distinguish what is merely ship's furniture from cargo. and applies here. Coal taken for hire as freight is in the warranty, "not to load," &c. Leonard B. 46–7.

A sensible construction must be given to the warranty. *Dwarris on Stat.* 592. It is a condition precedent,

The warranty was made to limit and define the risk. No exception not specified therein can be imported into it to relieve the assured against its effect, or to enlarge the risk against insurer's consent.

De Hahn v. *Hartley*, 1 Term Rep. 344.
Rich v. *Parker*, 7 Term, 705.
Craig v. *U. S. Ins. Co. Pet.* Cir. Ct. 410.
(*Semble*) *Ins. Co.* v. *Wright*, 1 *Wallace*, *p.* 470–1.

An exception in the policy is not a Warranty Yeaton v Fry 5 Granch 335 (a

There is nothing which shows the insurer contemplated that so much of the weight of the excepted articles taken on freight in the ship should be deducted as would be equivalent to the weight of ballast in case the ship were empty, or to dunnage in case the freight would not serve as dunnage, or both. Nearly double the limited weight could be taken on freight under such a construction of the warranty, and its object be practically nullified.

The sensible import of the warranty "not to load more than her registered tonnage with, &c.," admits no exception in favor of "dunnage," or "ballast," when they are selected of the prohibited articles.

The case Towne *v.* Henderson, 4 Welsby, Hurlstone & Gordon, 892, shows master may take cargo on freight to use in place of dunnage or ballast where the charter party does not include articles suited for these purposes, but it does not countenance the idea that the merchandize so taken and used is excluded from the category of cargo in relation to the ship. Iron used as "ballast" is not part of the ship's furniture, Lane *vs.* Neale, 2 Starkie, 105; Abbot on Shipping, 5.

No case of average or total loss can be shown where cargo performing such substituted duty was exempted, or included on the ground that it was ship's furniture. The defendant is original in starting an idea leading to such a consequence.

The reason of the prohibition is, that the safety of the ship is endangered by an excess of "dead weight"; it affects her power to resist the beating of the sea. The act of so loading the ship that a proper relation shall be maintained between her centre of displacement and her centre of gravity when loaded is vital to her safety. The warranty in this case is in the printed part of the policy, and expresses a condition precedent to the attaching of the risk *usual in all their* policies, to compel the proper and moderate loading of the ship.

Craig v. *U. S. Ins. Co*, *Peter, Cir. Ct.*, 416.

An excess of "dead weight" is equally dangerous to the ship's safety, irrespective of whether the name given the articles in their relation to the ship is dunnage, ballast, or cargo.

Weston *v.* Minot, 3 Wood and M. 447.
Weston *v.* Foster, 2 Curtis, 119.

The verb, to load, signifies in the warranty to lade upon the ship, to weigh her down with a burden; it had no relation, as the Court below erroneously assume it bore, to the name which the master and the shipper might concur to give the prohibited excess, for reasons growing out of their relation to each other,

or as a means to avoid the warranty of the owner, and compel the insurer to bear the peril of their wilfulness, or avarice, in overloading.

If we are to seek for the interpretation of the clause outside of its context, is it more natural to imply that it was based on the peril of the seas, or that it was based on a discrimination in technology which could be varied at pleasure by the acts of the owners' agent, without the consent of the insurer? In the first hypothesis, the warranty is sensible; in the last it is senseless, and no reason for inserting such a warranty can be given. If, for instance, the master should take one-third of his registered tonnage of coal, as ballast, one-third as dunnage, and then her registered tonnage as cargo, she would have have one and two-thirds her registered tonnage of coal laden on board.

The two cases cited above, show the danger of overloading with heavy goods vessels under the old Registry Law of the United States. The new tonnage measurement under the act of 1864, makes the registered tonnage of a vessel agree more closely with the displacement tonnage, and increases the danger of lading beyond the registry.

If the master has latitude under any pretence to load more than his registered tonnage of coal, there is no bound in the warranty to the latitude, and it practically is senseless and without effect. which is inconsistent with its insertion as a condition precedent to the risk attaching.

The prayer of the plaintiff ought to have been granted.

I. The entire question of what the warranty was turns upon the meaning of the words "to load." When the plaintiff warranted not to load his vessel with more than her registered tonnage what did he mean?

The usual meaning of the verb load, as given by Webster, is "to put in or on, to be carried." Worcester says it means "to

put a burden on or in, particularly for conveyance." All English authorities give substantially the same definition.

There is no proof of any peculiar meaning given to the word by mercantile custom or usage, and in the absence of such proof the presumption is that the parties used it in its ordinary sense or meaning, *i. e.*, to put in or on for transportation.

In determining the meaning which is to be given to the words "to load," we must also bear in mind the familiar principle of law that a warranty in a policy of insurance is to be strictly and literally construed.

Duer on Ins. Lect. 2.

This warranty, then, applied to the facts in this case, reads like this: Warranted not to put into the Alhambra for transportation from Liverpool to San Francisco more than 1,285 tons of coal, iron, or bricks, either or all, on this voyage.

If we consider the reason why this warranty was inserted, we shall be led to the same conclusion. It was well known that a large quantity of certain articles, including coal, iron, etc., carried in a vessel, endangered her life, rendering her unseaworthy.

If the vessel was filled with them, no matter in what form or under what name, the danger was there; merely calling them by a peculiar name, did not relieve the ship of the peril. The company provided against the risk, or intended to, in any form, and for that purpose used the strongest word in the English language, that she should not *load, i. e.*, should not take on board to transport, above a certain quantity of these articles.

If this construction of the word load is too strong under all the circumstances of the case, then let us take the construction or meaning given to it by the defendant, or rather by his counsel. In their brief, filed in the Circuit Court, between the same parties, they use the following language: "The precise question in the cause is, what is the meaning in the policy of the

words 'to load'? It is submitted that the words 'to load,' naturally import simply cargo."

The parties, in making their contract, undoubtedly used this word with one or the other of these meanings.

II. Do the facts show that the warranty was violated?

There is no question but that this coal was taken on board at Liverpool and carried to San Francisco, and bills of lading signed therefore, at the same rate of freight as the rest of the cargo.

But the defendant says it was taken on board as dunnage and therefore the warranty was not broken.

What is dunnage? Webster says it is "fagots, boughs, or loose materials of any kind, laid on the bottom of the ship to raise heavy goods above the bottom." The testimony in this case was that it was used substantially the same purpose, "to raise the cargo out of the salt water and leave a water way underneath." Does the mere fact that this coal was placed along the bottom of the vessel under an agreement with the freighter that it might be so stowed, take it out of the warranty? The agreement that the defandant made was that he would not load it, *i. e.*, take it in for transportation at all. His private agreement with the freighter cannot affect his agreement with plaintiff company. But the defendant answers that he as ship-owner was bound to dunnage his cargo. That is true; but there are various kinds of dunnage and the company did what it had a perfect right to do when it made this contract, it provided that the vessel should not take on board for transportation under any name, whether as dunnage or something else, beyond a certain amount of this article.

The facts show that the defendant could have obtained other articles for dunnage, and his captain testified "that if this coal had not been furnished he should have purchased planks on ship's account, for dunnage, and sold them in San Francisco, or some other articles that would have paid a profit."

Having agreed not to take on board coal, he should have used plank or other articles for dunnage.

If this construction of the word load is correct, then clearly there was error in not granting the prayer. The proofs were, that the same rate of freight was collected for this coal as for other goods shipped — that it was on the freight list or schedule of the ship's cargo — and what is still stronger, that a bill of lading was signed for it. It was not the ship owner's property.

These facts would be conclusive upon the character of this article among mercantile men, and it is submitted that it is conclusive in law. Kent, vol. 3, p. 207, says: "A bill of lading is a contract for the conveyance of the cargo."

In conclusion, we repeat that if the parties used the words "to load" in their usual and ordinary meaning, then clearly the first instruction asked for should have been given.

M. E. INGALLS,
CHAS. LEVI WOODBURY,
For Plaintiffs.

SUPREME COURT OF THE UNITED STATES.

No. 96.

GREAT WESTERN INSURANCE CO.

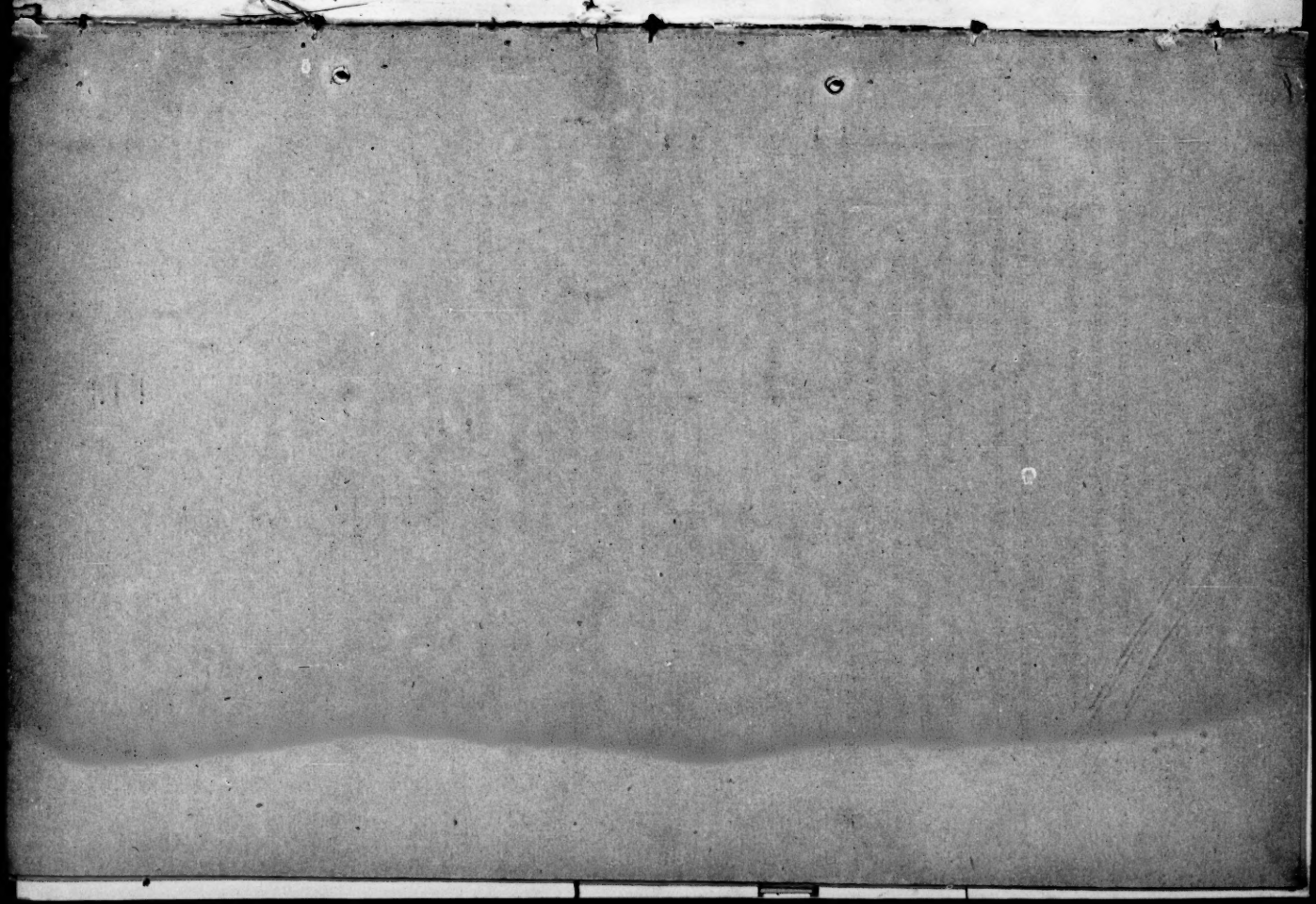
PLAINTIFF IN ERROR,

VS.

WILLIAM THWING.

ADDITIONAL BRIEF OF PLAINTIFF IN ERROR.

BOSTON:
ADDISON C. GETCHELL, PRINTER, 53 WASHINGTON STREET.
1872.



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For a clear understanding of the bearing of the rulings in this case upon the facts before the jury, it is necessary to give careful consideration to the objects and purposes of merchant vessels, and the relations to one another borne by cargo, furniture, stores, ballast, dunnage, &c.

It will be found that *ballast* and *dunnage*, in their relation to ship and cargo, have many points of resemblance, and that a brief preliminary consideration of ballast will throw light upon the subject under discussion.

The general object of merchant vessels is to transport merchandise from market to market, for commercial purposes; but, the *conditio sine qua non* is that the ship be seaworthy. One essential to seaworthiness is that the ship be in *trim*. *Trim* is a nautical word, referring to the balance of parts of the ship with each other, so adjusted as best to enable her to bear the effect of winds and waves. To this end, it is necessary not only that she be neither too light nor too heavy, but that the weight be distributed about the vessel with reference to the laws of mechanics. A few general rules are these: —

(1.) There must be heavy weight enough in the bottom to insure the ship's sinking sufficiently, if the rest of what she has on board is light.

(2.) If the greater part of the contents is light, there must be some dead weight above and in the wings as well as on the bottom, to balance the ship and prevent her rolling too much.

(3.) If the whole or a large part of the contents is heavy, no reference need be had to what is lowest in the stowage, or at the middle, for any nautical reasons.

The purpose of a merchant ship's existence is the carrying of merchandise. All available space must be devoted to that. Some space must be allowed for furniture, stores and crew. After that, the problem to be solved is this, — *to make the cargo trim the ship.* If the cargo consists wholly of heavy articles, or be mixed of heavy and light, the cargo will trim the ship. It becomes a question of scientific stowage.

If a cargo consists of iron, coal and other ores and metals, and articles manufactured from them, or of guano, or of many other heavy articles known to commerce, or if such articles constitute a sufficient proportion of the cargo, the cargo trims the ship, and the whole space is put to use.

If no other merchandise can be obtained than light goods, as tea, cotton, or cotton or silk fabrics, it will not trim the ship. In that case, some *extra matter*, of great specific gravity, must be put on board, and mostly at the bottom. The space occupied by this matter is lost to commerce. Such matter is called *ballast.* Its office is solely to preserve the trim of the ship.

To put on board ballast, is the last resort of all parties, and only taken to when cargo cannot be made to trim the ship.

Yachts and ships of war, carrying no cargo, still desire all the space possible for use. With them, the problem of trimming the ship and saving all possible space, is solved by the distribution of furniture, stores and armament, and the model and materials of construction. Of later times, small steam yachts secure their trim by having their keels and other lower portions made of iron. By this means, and the proper distribution of what is necessarily on board, resort to ballast may be avoided. In the smaller classes of steam-ships of war, the same result may be, to a great extent, attained. Where it cannot be, and as far as it cannot, ballast is introduced.

Merchant-ships will never be so constructed, even steamships, as to be in trim without cargo. If they were, they could not carry much cargo without being too deep. To be profitable carriers, they must be so constructed as to be as light as possible, and utterly unseaworthy, when they have only their stores and furniture on board.

Whether the ship-owner carries his own merchandise, or that of other persons for hire, he will endeavor to procure such cargo as will trim his ship. His selection of cargo is governed by commercial considerations, more or less affected by nautical necessities. Having secured a cargo, he will so stow it as to trim his ship. The heaviest articles will go to the bottom, and, of course, will be put on board first. Coal must always go to the bottom, not only on account of its weight, but because it would grind and sift through any cargo placed below it. Whoever ships coal in a vessel carrying a mixed cargo knows this, and makes his calculations accordingly. If the master knows there is to be coal, he will not put goods in the lower hold until the coal has gone in.

By a figure of speech, heavy portions of the cargo, stowed below, may be called *ballast*, because they secure the trim of the ship. They do the duty which ballast would do, if a resort to it were necessary. They enable the ship-owner to dispense with it. In like manner, judicious diet may, by figure of speech, be called *medicine*, because it performs the function which medicine would perform, if it were necessary to use it. But if a question were to arise under any statute or contract, whether articles of merchandise, shipped for transportation and delivery, so stowed as to secure the trim of the ship, were cargo or ballast, there could be no doubt that they must be treated as cargo.

The owner of the ship, if he also owns the cargo, is governed, in selecting it for transportation, by commercial reasons, as we have said, qualified somewhat by nautical reasons. He will take articles which will pay best at the port of delivery, and at the same time will secure the trim of his ship without loss of space, or with as little loss of space as possible. The fact that, in selecting the articles to compose his cargo, or in stowing them after they are selected, nautical considerations have entered into and qualified his commercial calculations, does not change any of the articles from cargo to ballast. If it did, no line could be drawn; for all cargo affects the trim of the ship; and this effect on the trim of the ship is always considered by parties in determining the proportions of articles of different weight to be received, and sometimes the freight to be paid for them. To insure a sufficient proportion of heavy articles, if they are not freely offered, the owner will take them at lower freights. They are still cargo. So, if the shipper knows that the other cargo

in a merchant-ship stores and cargo, which may be injured by wet, either water or dampness. This wet is mostly at the bottom of the ship, and largely on the sides, and to some extent under the deck beams. In stowing the stores and cargo of such vessels, the articles not affected by wet are put in the exposed places. If any affected by wet must, for any reason, be exposed to it, they must be protected by extra matter. This extra matter is called *dunnage*. It consists of whatever is cheapest and most convenient, and is placed wherever it is needed, above, below or on the sides, against what sailors call the "skin" of the ship. It is usually strips of board. If cargo, stores and furniture not affected by wet can be so placed as to prevent that which is so affected being exposed, dunnage is not necessary. And it is dispensed with as far as this can be done.

The stores, furniture and cargo proof against wet, and placed next the skin, may, by a figure of speech, be called *dunnage*, because they effect the purpose for which, but for them, it would have been necessary to use dunnage.

In like manner, it may be loosely said that the stores and cargo affected by wet are *dunnaged* by those which are not. But the mere fact that certain stores and cargo, not being affected by wet, are therefore stowed outside, against the skin, does not make them cease to be cargo and stores. If a question arose under a contract or statute, they must necessarily be held to be cargo and stores.

In all ships, ballast, as shingle or kentledge, necessarily does some of the office of dunnage, if that office is required. If any cargo or stores which must be placed below all others, are liable to be affected by wet, the ballast will keep them out of the wet, as it must necessarily rise high enough for that purpose. But if the cargo or stores placed next the ballast are not of that character, the office of dunnage is not invoked. If a question arose whether the shingle or kentledge in the bottom of a ship was ballast or dunnage, it would certainly be ballast if the cargo or stores placed upon it did not require dunnage. If they did, it would be held ballast rather than dunnage, as the purpose for which it is procured, or made and placed on board, is to trim the ship; and if sometimes it may operate to protect cargo and stores from wet, that is incidental.

If on a particular passage certain of the furniture of a ship, as

chain cables, shot or guns, were not needed for use, and should be placed next the keelson, there being no ballast on board, and should so trim the ship, those articles would still be furniture, and not ballast or dunnage.

A large part of the merchandise transported for commercial purposes requires no dunnage. It is either unaffected by wet, or so little affected as to render extra matter for dunnage unnecessary.

Iron, lead, coal, guano and most metals and ores, may be placed, and usually are, directly against the skin of the ship, at the bottom and sides. If dunnage may be of very slight service to some of them, it is not worth the trouble and loss of room attending its use. Whatever cargo placed next the skin, below, above or at the sides, serves to protect the rest of the cargo from wet or dampness, does the same office with dunnage. But if a question arises whether such articles cease to be cargo and become dunnage, under any contract or statute, they must be held to be cargo.

The outside row of everything serves to protect an inside row, at sea or on shore. The front rank in battle protects the rear rank, and so, by figure of speech, might be called a *rampart*. But if the question arose how many men the force consisted of, and how many feet of ramparts there were, the front rank would be counted as men and not as rampart.

Case 1. A cargo consisting entirely of articles unaffected by wet, as iron, coal, ores, &c., requires no dunnage. If the cargo were all coal there would be neither dunnage nor ballast. So, if it were all iron, or all guano, &c., &c.

Case 2. If the cargo consisted partly of coal, and the rest of other articles, heavy, light, or both, the coal would necessarily go to the bottom, equally with iron as regards weight, but preferably to iron because of its liability to grind and sift through any cargo that should be stowed below it; and because, as it is stowed in bulk, it will fit in better about the keelson. Whether the coal placed there performed the function of ballast in trimming the ship, would depend upon the specific gravity of the other articles of the cargo. Whether it performed the function of dunnage, would depend upon the character of the cargo resting immediately upon it. If that

was iron, or any other article unaffected by wet, the coal would not perform that office. If it was an article affected by wet, it would perform the office What is said of coal, is true of every other heavy article of merchandise placed in the bottom of the ship. Whether and how far it is necessary to assist in trimming the ship, or to keep the next tier of cargo dry, depends entirely on circumstances.

Case 3. The ship is to carry a full cargo of an article affected by wet. It must always be well protected on the bottom and sides, and, in some cases, on the top. If this cargo is of such specific gravity as to trim the ship, no ballast is needed. The extra matter placed under the cargo will therefore not be ballast, but dunnage. There should be no more placed there than will raise the cargo the requisite height.

As this cargo must be kept clear of a given space in the bottom, whether for dunnage, ballast, or both, that space must be utilized, if possible. If other cargo not affected by wet can be procured and placed there, this comes within Case 2. It presents a case in which dunnage is unnecessary. If no such cargo can be procured, dunnage must be resorted to. As that space is lost to the shipper of the supposed cargo in any event, it is immaterial to him whether the ship-owner fills it with cargo or with ballast or dunnage. The only right of the shipper is to have all the space consistent with protection of his shipment and the trim of the ship.

Towse *v.* Henderson, 4 Exch. 890.

Whether the supposed cargo belongs to the ship-owner or is taken on freight, it is equally the interest of the ship-owner to fill the supposed space with cargo rather than dunnage. Suppose him to find an article of merchandise, known as such in the markets, and a universally recognized subject of commercial transportation, which is unaffected by wet, and to take it on freight, on a bill of lading. subject to the usual obligations of carriage and delivery, and to fill with it the supposed space. It becomes simply *the bottom tier of the cargo*. Every cargo with a variety of articles has a bottom and outside tier, selected and stowed with reference to wet, and in many cases rendering dunnage unnecessary. If a question

arose whether the supposed shipment was cargo or dunnage, either under a contract or under a fiscal or penal statute, it would be cargo, upon the principles heretofore explained, and not dunnage.

Case 4. The ship is at a port seeking cargo or freight. The problem is, to fill the ship with cargo. This means, (1) to make the cargo trim the ship; (2) to make the cargo protect itself. The master will endeavor to procure such shipments as will effect these two objects. If the shipments he procures, whether of one article or of various articles, constitute a cargo which will trim the ship, the first problem is solved, and he needs no ballast. If they constitute a cargo not affected by wet, the second problem is solved, and he needs no dunnage. If a sufficient proportion of it is unaffected by wet, the second problem is equally solved, and he needs no dunnage. It becomes a question of skilful stowage.

The reports are full of cases showing charter parties which specify the character and weight of certain proportions of the cargo to be furnished, aimed at the two objects of avoiding recourse to ballast, or to dunnage, which displace cargo. To put to use the entire carrying space of a ship, and avoid recourse to ballast or dunnage, is a recognized object of all these contracts and understandings.

The courts have leaned to such constructions of these contracts as utilize to the utmost the whole of the carrying capacity of the ship, and yield the largest freights consistent with the rights of both parties.

Rich *v.* Parrott, 1 Cliff. 55.
Capper *v.* Forster, 3 Bingh. (N.C.) 938.
Cockburn *v.* Alexander, 6 C. B. 791.
Towse *v.* Henderson, 4 Exch. 890.
Cole *v.* Meek, 15 C. B. (N.S.) 795.
Irving *v.* Clegg, 1 Bingh. (N.C.) 53.

Wherever the law requires a distinction to be made between dunnage and cargo, a definition analagous to that suggested between ballast and cargo may be useful.

If articles known as merchandise and as subjects of marine transportation for commercial purposes, are taken on board under bills of lading or charter party, subject to the usual obligations respecting

carriage and delivery, they are cargo and not dunnage, although they may be unaffected by wet, and for that reason placed in the lower or outside tiers, and so serve to protect other cargo that may be affected by wet.

Nautical considerations respecting preservation of cargo from wet, affect every part a cargo contracted for. If certain goods are not affected by wet, they can be more conveniently taken, as they may be put anywhere, and consequently may be taken at lower rates. So, the fact that there is a sufficiency of such goods engaged to put on the bottom and along the sides, may enable the ship to take, as the rest of her cargo, goods affected by wet at lower rates. Nautical considerations respecting trim and wet, act and re-act, with commercial considerations respecting freights or market prices, in various ways and degrees over the whole cargo.

If extra matter, not articles of commerce and subjects of marine transportation for commercial purposes, either in general or in the particular case, is put on board solely to protect cargo from wet, it is dunnage, although it may have a pecuniary value.

There may be cases of articles shipped on freight which may come near the line, being scarcely subjects of commerce, and paying rather a nominal freight, and taken almost entirely because they will protect the cargo from wet; but the present case calls for no fine distinction. Cannel coal is the most high-priced of coals, and one of the chief articles of marine transportation for commercial purposes in modern times. In this case, it was taken under the charter party and a bill of lading, and at the same rate of freight with the rest of the cargo.

To apply the above considerations to the instructions and facts of the present case.

Concede that the term "load" confines the warranty to cargo, and does not include stores, furniture, ballast or dunnage.

The construction most favorable to the defendant would make the warranty read thus: "Warranted not to load more than 1285 tons of cargo of lead, marble, coal, slate, copper ore, salt, stone, bricks, grain or iron, either or all, on any one passage."

The ship does load over 1300 tons of iron and coal. The iron and coal are taken under a charter party, for a common rate of 51 shillings per ton; bills of lading are signed for all, and it was shipped and carried under the usual obligations as to carriage and

delivery. So far, there is a clear case of breach of warranty. Had the whole shipment been coal, there would have been no question of breach. Had the whole been iron, there would have been no question. How does it differ because it is part coal and part iron?

Coal and iron will trim a ship, and therefore require no ballast. They are not affected by water, and therefore require no dunnage. There was no pretence in this case that iron ever required dunnage.

Both being on board, one or the other must be underneath. Whichever went below become the lower tier, or outside row. It occupied the space which dunnage would have occupied, and would have performed the office to the cargo above which dunnage would have performed, if iron required protection from wet, which it does not. If this shipment of coal can be treated as dunnage to the iron, iron may be dunnage to coal, and lead to iron, and copper to lead, and so on, embracing all the heavy articles of commerce unaffected by wet.

It is transparent that this case was decided on a trick of words, — a figure of speech. The cargo was one which required no dunnage. Cannel coal is, as we have seen, a well-known and high-priced article of transportation for commercial purposes. It was transported in this case at the same rate of freight with the iron, upon a bill of lading, in the usual manner of commerce, and under the general terms of the charter party. It would seem that great ingenuity in putting the case before the jury by the counsel for the defendant, required especial care and treatment from the judge, which it failed to receive. Loose language respecting cargo which may, under some circumstances, protect other cargo from wet, was permitted to extract this coal from cargo and put it in the category of dunnage, by a figure of speech; although it was in fact cargo, and no dunnage was required.

The only piece of testimony that needs much attention is this (Record, p. 3): "That the master agreed with the charterer, in addition to the agreement in the charter party, that he should furnish 250 tons of cannel coal for dunnage of said ship for said voyage."

This was not in writing, and the form in which it is cast is not important. The meaning of the agreement is evident. It is that, of the cargo to be furnished under the charter party, 250 tons should be coal. This shows that the charter party did not settle what the cargo was to be. If, at the time the verbal agreement

was made, it was known that the rest of the cargo was to be iron, or any other article not affected by wet, there would be no agreement about dunnage. The proper explanation is doubtless this: It not being settled what the cargo should be, allowing the shipper a right to put on board articles affected by wet and therefore requiring dunnage, by which both parties would lose a certain space in the bottom, it was agreed that a part of the cargo should be coal. The coal paid the rate of freight stipulated by the charter party. There is no evidence that the special agreement respecting the coal reduced the general rate of freight in the charter party. If it had done so, it would not change the coal from cargo to dunnage. We have seen that a ship-owner, in loading his own ship, or in his arrangements with shippers, provides for certain kinds of cargo, in certain proportions, having in view the trimming of the ship, and protection against wet; and this must sometimes result in less profit than if he were not obliged to consider either of those results. Yet it will not change cargo to ballast or dunnage.

Suppose it had been proved in this case that the cargo expected was of light articles, affected by wet, and that the master, having in view the trim of the ship and the protection of the cargo, had agreed with the shipper that a certain portion of the cargo should be a heavy article not affected by wet, as iron, coal, &c., and that that article, being less profitable commercially, at the port of delivery than the other articles, had been taken at a less rate of freight, yet on specified freight, and under a bill of lading, and had been placed below, and served to trim the ship and keep the rest of the cargo from wet. On a question between the ship and a stranger to the cargo, as the government or underwriters, can there be a doubt that the supposed article would be cargo, and not dunnage?

The arrangements between the master and shipper are immaterial, under the warranty. The warranty does not address itself to those arrangements, but weighs the amount of cargo put on board, on whatever terms it is received. It is immaterial whether it is owned by the ship-owner or transported on contract; whether it pays high or low freight, or is taken as a public charity without pay; and whether it be stowed with reference to trimming the ship, or with reference to wet, or neither, or both. It is covered by the warranty unless it is shown to have been not merchandise trans-

ported for commercial purposes, but extra matter put on board and used solely to secure the trim of the ship, or the cargo from wet.

The other items of evidence furnish like proof of the sleight-of-hand practised upon the words. "It [the coal] was used and placed along the bottom of the said ship fore and aft, as dunnage." That is the way in which coal would always be stowed, where there is other cargo; and coal is always the lowest tier. All that is meant is, that the coal so stowed would have protected the articles immediately above it from wet, if they had required the protection. The same may be said of the lower tier of every cargo ever shipped, if it did not itself require dunnage.

Another piece of testimony: "That a cargo was not properly stowed unless properly dunnaged." This testimony applies only to cargo the whole of which is liable to be affected by wet. If part is not, that part will be placed below or at the side, and dunnage will not be needed.

Again, "that in cargoes from Liverpool, cannel coal is frequently used for dunnage." This is true of all parts of the world where there is coal. As coal naturally goes below, and is not affected by wet, it protects cargo above it, if it needs protection; and, no doubt, in making up assorted cargoes, it is often stipulated that a portion shall be coal, having in view its power of acting in the double capacity of trimming the ship and securing the cargo from wet, if either shall be necessary.

Again, "that cannel coal, when used for dunnage for certain cargoes, is liable to be crushed and otherwise injured." That is to say, when it is the lower tier, and heavy goods are allowed to press upon it. The lower tier is always liable to that result.

Again, "that when cannel coal is received for cargo, it is usually stowed in a different manner from what it is when used as dunnage, although in some cargoes it will be stowed in the same manner." The meaning of this is, that if it is intended to be placed as the lower tier, with goods above it liable to be affected by wet, it is so distributed as best to effect the purpose; while, if that purpose is not necessary, there may or may not be a difference in the manner of its stowage. The same may be said of all heavy merchandise not affected by wet, and of such a character as usually to be sent to the bottom.

Again, "it also appeared that cannel coal is sometimes taken for dunnage on ship's account, and then is sold at the port of dis-

charge on ship's account." In other words, cannel coal is always an article of merchandise, and never dunnage. If the ship-owner carries it on his own account, induced perhaps partly by its two-fold quality of aiding to trim the ship and to protect cargo above it from wet, it is never kept on board as dunnage would be, but is bought and sold as merchandise. Cannel coal in San Francisco has its market price known in Liverpool, and it is a subject of transportation accordingly. The nature of all coal is such that it enables all concerned to dispense with ballast and dunnage.

This being the real nature of the case, and the result being an evasion of the warranty, the only question is, whether it is remediable under the writ of error.

I. The instruction prayed, should have been given in substance. It asked for a ruling upon facts conceded, assumed, or not in dispute. It was not disputed that the coal paid freight as per charter party, and was carried under a bill of lading. The nature of cannel coal, as a known and high-priced article of commerce, is understood. The prayer assumes all that the defendant sought to prove respecting the character of dunnage attributed to this coal. On this state of things, the court should have instructed the jury, as matter of law, that the coal came under the word "load" in the warranty. There was no fact in dispute requiring solution by the jury.

If the practice of the court made it necessary to submit anything to the jury, it was but a form, and the instruction should have been substantially this: — This coal, shipped as conceded on bill of lading, and paying freight as per charter party, if the jury believed all the facts offered in proof by the defendant respecting its being received and used as dunnage, came within the warranty.

This ruling should have been given, unless in a contract between ship-owner and underwriter limiting the weight of cargo to be carried, a heavy article unaffected by wet, and for that reason placed below, can be excluded from cargo and pass as dunnage, although it be a known article of commerce, transported as such at usual rates of freight, and, perhaps, provided for the special reason that it would save the loss incurred by providing dunnage.

II. The instruction given was incorrect. "If they believed from the evidence that the said cannel coal was received and used as dunnage, and not as cargo, it would not amount to a loading under the clause of the policy."

The warranty was a matter between the ship and the underwriter, exclusively.

The instruction given makes the warranty depend upon the contract between the master and the shipper. If, as between them, the coal was to be treated as dunnage, the warranty did not cover it. But the protection of the underwriters entitled them to weigh all articles of commerce, transported in the way of commerce. The court could not exclude from the weight anything but actual dunnage, which would have been such irrespective of the contract between master and shipper. Suppose the defendant Thwing had been the owner of this coal and iron, and had sent the whole to San Francisco, to his consignee for sale. On what pretence, as between him and his underwriter, could he have excluded the weight of the coal? No phrases he might use in dealing with himself, or with his master or consignee would change it from cargo to either ballast or dunnage. Suppose he had testified that he bought it in Liverpool to put in the bottom of his ship to secure its trim in case he should fill the ship with light goods, or to enable him to put goods affected by wet as near the bottom as was safe, and that he had actually filled his ship in that manner, and that the coal had secured the trim of the ship and protected the cargo next above it. As between him and his underwriter, it would have been cargo, unless all articles of a cargo could be excluded, in the procuring and stowing of which nautical considerations respecting trim or respecting wet and dampness qualified the commercial considerations.

Considerations respecting liability to be affected by wet or dampness enter into all contracts for carriage, as well as into the stowage of cargo received. Some articles are not affected at all: some are more, and some less. Some can go into the outer row, and some cannot. Those that can, will protect those that cannot. To avoid dunnage a master or owner takes care that if part of his cargo is delicate, he shall have enough that is not.

Suppose that the plaintiff in Towse *v.* Henderson (4 Exch. 890) had warranted his underwriter that the ship should not load with more than 1000 tons' weight, and that the defendant had put on board 1000 tons' weight of tea. In a question on the warranty, between the plaintiff and the underwriter, could there be a doubt that the 80 tons' weight of antimony ore would be counted in the loading of the ship?

The instruction is incorrect for a further reason: It authorized

the jury to find, on the evidence detailed, that the cannel coal was "not cargo."

If the jury believed all the facts offered in evidence by the defendant, no inference of fact they could draw from them would in law exclude this coal from the category of cargo, as between the shipper and the underwriters.

It seems, from the opinion of the learned judge attached to the defendant's brief, that he considered the question whether this coal was cargo, as between the shipper and the underwriters, to be a question purely of fact for the jury. But it was a question of law. Assuming that the jury would believe every fact which the defendant's testimony tended to prove, and would draw from those facts every permissible inference of fact favorable to the defendant, the result could not, in law, make this coal dunnage, and "not cargo," as between the vessel and the underwriters.

SUMMARY.

I. It may be assumed, that "load" in the warranty qualifies only cargo.

II. As between the ship and the underwriters, such an article of commerce as cannel coal, transported from Liverpool to San Francisco, upon bill of lading, paying freight as per charter party, in quantity nearly one fifth of the entire cargo, must be included in estimating the weight of the "loading," although the ship-owner should prove that it was in fact placed next the bottom, and levelled and stowed as dunnage would be, and was intended to secure the cargo next above it from wet, and did not occupy more space than was necessary for that purpose, and that, in his arrangement with the shipper, he specially stipulated for that quantity of coal, the terms of the charter party not authorizing him to require it; and that, when so used, cannel coal is sometimes liable to be injured, and is frequently so used in cargoes from Liverpool, and that the master and shipper understood that it was to be so used when the agreement was made.

III. The course adopted by the court in the instructions given and refused were to the effect, and so authorized the jury to say, that such a shipment so made was, in law, as between the ship and the underwriters, not to be included in the weight of the loading.

RICHARD H. DANA, JR.,
for the Plaintiff in Error.

The opinion of Judge Lowell, filed as part of the brief of the defendant-in-error, shows, in one passage, the fallacy which controlled his payment, (p. 8:)

"The strongest mode of stating the argument for the plaintiff on this point is, that here, in fact, was a cargo that needed no dunnage, because a part of it would serve the purpose. But the facts seem rather to show that here was dunnage of intrinsic value, besides the cargo which the charterer had agreed to furnish; and which, without a special agreement, he could not furnish, because it would be the right of the master to supply such dunnage as might be proper at his own risk."

I. The coal was not something "besides the cargo the charterer had agreed to furnish." It was part of the cargo, furnished under a special agreement, subsequent and additional to the charter party.

II. It is not true that where the owner of a ship has let her full capacity to a charterer, "it would be the right of the master to supply such dunnage as might be proper, at his own risk," or that the charterer, "without a special agreement, could not furnish it."

On the contrary, in such a case the charterer would have a right to put on board, as part of his cargo, an article not affected by wet, and, if the rest was liable to be so affected, to require it to be so stowed so as to protect the rest. In this case, the charterer had the right to put on board this coal and have it placed at the bottom, if he needed it to protect the rest. The special agreement was made, not to enable, but to compel him to furnish it. The ship-owner has no right to furnish dunnage, but an obligation to protect the cargo from wet, without dunnage, if possible.

Supreme Court of the United States.

No. 294.

THE GREAT WESTERN INSURANCE CO.,

PLAINTIFF IN ERROR,

vs.

WILLIAM THWING.

STATEMENT OF CASE AND BRIEF BY DEFENDANT.

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STATEMENT OF CASE AND BRIEF BY DEFENDANT.

STATEMENT.

THIS action was brought by the plaintiffs in error to recover back money paid by them to the defendant for a partial loss under a policy of insurance, upon the ground that there had been a breach of warranty, in regard to the *loading* of the vessel for the voyage insured against, of which breach the plaintiffs were ignorant when they paid this loss. (Record, pp. 3 and 4.)

This warranty is as follows: "Warranted not *to load more than her registered tonnage* with lead, marble, coal, slate, copper ore, salt, stone, bricks, grain or iron, either or all, on any one passage." (Record, pp. 3, 6.)

It was agreed that the *registered* tonnage of the ship was 1,285 tons, and that she had on board 1,064 tons of iron, six tons of brick and 238 tons of cannel coal; in all, 1,308 tons, or *only* 23 *tons more than her registered tonnage.* (Record, p. 3.)

It appeared in evidence that the master procured this cannel coal for dunnage, under an agreement with the charterer, independent of the charter-party that cannel coal should be provided for dunnage; and that he received it and used and placed it along the bottom of the ship fore and aft, as dunnage. It further appeared that dunnage was

necessary for the proper storage of a cargo, and that in Liverpool cargoes, cannel coal is frequently used as dunnage. That cannel coal when received as cargo, was usually stored differently than when used as dunnage, and that used as dunnage it was liable to be broken and injured. That in this case the Master signed a bill of lading for this coal, put it on his freight bill, and collected freight on it. (Record, pp. 3, 4.)

The plaintiff's counsel asked the Court to rule "that if freight was received and paid for this coal, it came within the warranty, although used as dunnage;" but instead of this, the Court did instruct the jury "that if they believed from the evidence that said cannel coal was received and used as dunnage, and not as cargo, it would not amount to a loading under the clause of the policy referred to, and the plaintiff could not recover."

BRIEF.

I.

In giving a construction to the clause in question, there are certain familiar principles in regard to marine contracts and marine insurance which should be borne in mind.

1. A policy of insurance on a vessel, whether for a voyage, as in this case, or for a period of time, contemplates the employment of the vessel in the usual way, and provides for an indemnity against certain enumerated perils while the vessel is thus employed.

2. Now, the owner of a ship, in her employment either as a general ship or under a letting of her entire capacity, impliedly agrees that she shall be in a condition to carry safely the cargo laden on board of her, provided she encounters only the usual and ordinary perils of the voyage.

3. In preparing his ship for such employment, he must not only see that she is tight and staunch in her hull, that her masts, spars, rigging and sails are sufficient, that she has suitable anchors and chains, and a full compliment in crew and stores, &c., but that she is in proper trim and that her cargo is properly stowed, *and that she has the requisite ballast and dunnage to accomplish this.*

1 Phillip on Ins. (5th Ed.) Sub sect. 704 & 706.
Maude & Pollock on Ship. (3d Eng. Ed.) 97, 283.
Maclachlan on Ship. p. 354.

4. It is as well settled that it is the duty of the owner of the vessel to furnish such ballast and dunnage as are requisite for the voyage, as it is that he shall provide anchors and chains.

1 Parsons Maritime Laws, p. 243.
Maude & Pollock on Ship, p. 283.
Maclachlan on Ship. p. 354.
Moorsom *vs.* Page, 4 Camp. R. 103.
Irving *vs.* Clegg, 1 Bing. N. C. 53.

5. This duty of the ship-owner to furnish the requisite ballast and dunnage, carries with it the right to occupy the space necessary to properly dunnage and ballast the vessel with any articles suitable for that purpose, and receive freight thereon, "notwithstanding the whole ship is chartered to another."

Towse *vs.* Henderson, 4 Exch. 890.
Southampton Steam Colliery Co. *vs.* Clarke, 6 L. R. (Exch.) on p. 57 (Dec. 1870).
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II.

Now the single precise question of the cause is, What is the meaning in this policy of the words, "warranted not to load?" Do they refer to cargo only, or are they to be construed to extend to all articles that may be placed on board the ship to fit her for the reception of cargo, or to enable her to safely and successfully prosecute her voyage, and without injury to her cargo?

1. The words to be construed are found in a policy of Insurance on "a voyage from Liverpool to San Francisco." The words "to load," therefore, have reference to a voyage, and to the mode in which the ship shall be loaded for that voyage, — and thus naturally, if not necessarily, point to cargo.

2. But further, in all maritime contracts which we have found — as well as in the common acceptation of the terms — "to load" or "the loading" of a ship, refer solely to cargo, and not to ballast — which may be iron kentledge — nor to spare chains, anchors, nor to dunnage. This is shown by the settled use of the word in charter parties where the whole capacity of the ship is let to the charterer. Neither the ballast nor dunnage are deemed part of the lading, although

necessary for the proper storage of a cargo, and that in Liverpool cargoes, cannel coal is frequently used as dunnage. That cannel coal when received as cargo, was usually stored differently than when used as dunnage, and that used as dunnage it was liable to be broken and injured. That in this case the Master signed a bill of lading for this coal, put it on his freight bill, and collected freight on it. (Record, pp. 3, 4.)

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3. In preparing his ship for such employment, he must not only see that she is tight and staunch in her hull, that her masts, spars, rigging and sails are sufficient, that she has suitable anchors and chains, and a full compliment in crew and stores, &c., but that she is in proper trim and that her cargo is properly stowed, *and that she has the requisite ballast and dunnage to accomplish this.*

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the ship-owner may make a profit on them by way of freight or otherwise.

Towse *v.* Henderson, 4 Exch. 890.
Southampton Steam Colliery Co. *v.* Clarke, 6 L. R. (Exch.), on p. 57 (Dec. 1870).

3. In case of doubt, this warranty is to be construed in favor of the assured, since the underwriter, in whose favor the warranty is made, is bound to make clear a clause inserted for his own benefit, and attended with forfeiture or penalty to the assured.

1 Arnold, Ins. 588 [585], § 215.

4. If the intent of the parties had been to effect a warranty against the existence on board the ship on the voyage, (whether as equipment or cargo), of any aggregate excess in the prohibited weight of the articles enumerated, they could not have failed to express that intent by other than the words "to load," since they both well knew that iron, (one of the enumerated articles), to a weighty extent, in chains, anchors, formed part of the equipment of every ship for a voyage, even if kentledge were not used as ballast.

5. If the warranty extends to ballast, how is the weight of stone and iron ballast to be ascertained? It is a matter of common knowledge that this is the subject of very loose computation,—a matter of 23 tons in a ship of upwards of 1,200 tons would be of no moment.

III.

The next question is, Does the fact that the articles,—planks, for instance, used for dunnage, or iron kentledge used for ballast,—are vendible at the end of the voyage,—or that the owner, instead of purchasing the dunnage and ballast and selling them at the end of the voyage, contracts with a third party to furnish them, deliverable upon payment of freight, to the agent of such third party, at the port of destination,—make those articles cargo, within the meaning of the policy, which would not otherwise be cargo?

It is submitted, that if, in legal construction under such a warranty, dunnage is not lading or cargo, although vendible and usually sold at the end of the voyage, it does not become such lading or cargo because the owner gets a freight upon it by contract, instead of purchasing and selling. If the purpose of the warranty was that dunnage should

lose its ordinary character under such a state of facts, those who required the warranty were bound to have so expressed it in the contract.

IV.

Upon a motion for a new trial in this case, the precise question now presented was argued before Mr. Justice Clifford and Judge Lowell of the District Court, and the opinion of the Court, was delivered by the latter judge and is hereto appended.

This precise question has since then also been decided by the State court in a suit between the same parties under this policy for a further loss on the same voyage.

Thwing *vs.* Great western Ins. Co. 103 Mass. 401.

S. BARTLETT,
D. THAXTER,
for Defendant.

CIRCUIT COURT OF THE UNITED STATES.

MASSACHUSETTS DISTRICT.

GREAT WESTERN INS. CO. *v.* WILLIAM THWING.

LOWELL, J.

Assumpsit to recover back money paid for a partial loss, under a policy of insurance, on the ship Alhambra, on a voyage from Liverpool to San Francisco. The policy contained a warranty that the ship should not "load more than her registered tonnage of lead, marble, coal, slate, copper ore, salt, stone, bricks, grain, or iron, either or all, on any one passage." The ship took on board at Liverpool, among other things, 1,064 tons of iron, 6 tons of brick, and 238 tons of cannel coal, making in all, 1,308 tons, and her register showed 1,285 tons, making an excess of twenty-three tons. There was evidence that this coal was used for dunnage; that cannel coal is suitable for dunnage, and is often used for that purpose in cargoes shipped at Liverpool; and that when so used it is liable to be crushed and otherwise injured; and when received for cargo it is usually stored differently from dunnage. And on the other hand, there was evidence that the charterer of the ship made an agreement with the master, independent of his charter party, to furnish this coal for dunnage, and to pay freight for it, and that it was put in the freight bill, and a bill of lading signed, and freight paid for it. The plaintiffs, when they paid the loss, were not aware of any breach of the warranty, and it was agreed that they could maintain their action if the loss was not covered by the policy.

The plaintiffs asked the judge to rule that if freight was paid for this coal it came within the warranty, although used for dunnage. But the instruction given was, that if the article was in fact received as dunnage, and not as cargo, it would not be part of the loading within the meaning of the contract. This instruction we are now asked to review. Upon consideration we are satisfied with the instructions given to the jury. There was no question made concerning the fitness of cannel coal as dunnage, or of its being often used for that purpose, or of its being really so used here; but only whether, under the circumstances of this case, it was not fairly within the term of the warranty.

A warranty in a policy, like a condition in a deed, since it goes to

defeat the general purpose of the contract, should be construed strictly. So construed, it seems to us, that the agreement was not to take cargo beyond the registered tonnage of the ship. It is argued that the purpose was to prevent the overloading of the vessel, and this is undoubtedly true; but the contract itself does not provide that no more than a certain weight shall be put on board the vessel, but only that the "loading" shall not exceed so much.

It is said that to load means to put or take on board for the purpose of carrying, and that the dunnage is and must be carried as far as the cargo is carried, and is, in fact, rather an incident to the cargo, than any part of the tackle, apparel, or furniture of the ship. We are not prepared to say that dunnage is not a part of the fittings of the ship to enable her to carry her cargo safely and properly. But if not, it does not follow that it is part of the cargo. The subject-matter of this insurance is a ship expected to carry cargo; the stipulation has reference to cargo and numerated articles which may probably be shipped as such; and it seems to us, construing this warranty strictly, though without any violence to the language, that it fairly means "if the cargo shall be iron, coal, grain, etc., either or all, he shall not take as such cargo more than the registered tonnage." Suppose there were no enumeration, but that the stipulation merely said, warranted not to load more than her registered tonnage, ought the usual and necessary dunnage, say of plank, wood, rattan, or mats, to be counted, though they might amount to a very considerable weight? Could passengers' luggage be within the warranty in such a case? Or take the case of a freighting steamer; the coal necessary for the use of her engines would not be estimated in ascertaining whether she had loaded iron, coal, stone, etc., beyond the agreed amount; and this because the warranty relates to a different subject, the cargo, and supposes the vessel to be duly fitted and prepared to receive her agreed cargo, before it begins to operate. It may be said that in such a case the coal bunkers are no part of the registered capacity of the vessel; but I apprehend that the decision could not turn on the fact that the coal was or was not carried in the bunkers. If it was mixed up with the cargo, the result would be the same. So here, if iron, etc., were carried on deck or in the cabin, but carried as cargo, and not as stores or dunnage, the warranty would be broken.

If this be so, and if, as the jury have found, this cannel coal was in truth used for dunnage, it does not seem material that freight was paid for it. The evidence shows that it was the subject of a special agreement, and was stowed in a way that cargo ought not to be stowed.

The fact that the article has a market value does not change its character and bring it within the language, where, if furnished by the ship, and of no great value, it would not be included. Perhaps nearly all dunnage has some value. The strongest mode of stating the argument for the plaintiff on this point is, that here, in fact, was a cargo that needed no dunnage, because a part of it would serve the purpose. But the facts seem rather to show that here was dunnage of intrinsic value, besides the cargo which the charterer had agreed to furnish; and, which, without a special agreement, he could not furnish, because it would be the right of the master to supply such dunnage as might be proper, at his own risk. When that had been supplied, by whomsoever it might be supplied, the ship was ready to receive her cargo. It occupied space, and was put on board under a responsibility different from that of the loading, properly so called. This is rather a question of fact than of law, and the jury have found, in effect, that this coal was used in good faith, and properly, as dunnage; and we are not ready to set aside the verdict on this point.

M. E. INGALLS, *for Plaintiff.*
S. BARTLETT, & D. THAXTER, *for Defendant.*